No. 79-65

IN THE

Supreme Court of the United States

October Term, 1978

DOUGLAS S. GARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO MEMORANDUM IN OPPOSITION

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TABLE OF AUTHORITIES CITED

Cases

Statute

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The United States has opposed the petition for a writ of certiorari on the ground that the district court properly applied the Nevada sightseer statute in determining that, as a matter of law, petitioner could not recover under the Federal Tort Claims Act. It is the contention of the United States that a state

statute of this kind, enacted for the purpose of encouraging landowners to open land to the public for recreational use, is just as applicable to open public domain land as it is to privately owned land which is reserved for private use. It is also the contention of the United States that even though the Nevada statute has never been interpreted by the Nevada courts, the lower courts were correct in concluding that in order to impose liability under this statute for a willful failure to guard, or to warn against, a dangerous condition, use, structure or activity, it is incumbent upon the injured person to show that the failure was not only willful, but also that it was the result of a design, purpose and intent to do wrong and to inflict injury. Inasmuch as no federal employee admitted that he intended to cause injury to those members of the public who were likely to enter unguarded and unprotected abandoned mines, an activity which was well known to the responsible federal officials, the United States has defended the holding of the lower courts that there was no evidence of any willful failure on the part of the United States to guard or warn against the mineshaft into which the plaintiff fell. Finally, the United States has declined to discuss petitioner's challenge to the constitutionality of the Nevada statute, taking refuge behind the court of appeal's refusal to consider this important issue.

1. In its Memorandum in Opposition the United States has misinterpreted the state of the evidence presented to the district court in the summary judgment proceeding. On page 1 of its Memorandum the United States has asserted that the abandoned mine in which the plaintiff's accident occured "was not

visible from the highway." To the contrary, there was evidence that it was visible from the highway. Richard Merrit, one of the young men who accompanied the plaintiff, so testified. (R. Merrit DEPO, p. 19, lines 2-4).[1] A photograph submitted to the district court during the hearing shows that both mines were visible from the highway. (R.R.T., January 15, 1976, p. 9). Mr. McAlexander, an employee of the Mining Enforcement and Safety Administration,[2] testified that when he went to the mine to investigate the plaintiff's accident, the mines were visible from the highway. (R. McAlexander DEPO, p. 34, line 25 - p. 35, line 1).

On page 3 of its Memorandum the United States has referred to "the unchallenged testimony of the principal federal official involved" that he had never noticed any activity or persons in the vicinity of the mine in which the plaintiff was injured, had never received any expressions of concern about its safety and had never heard of any other accident involving this mine. The characterization of this testimony as "unchallenged" is somewhat inaccurate. The witness was Mr. Webb, the Supervisory Mining Engineer for the Nevada State Office of the Bureau of Land Management.[3] Mr. Webb did give an affidavit setting forth the matters mentioned by the United States. (R.C.R., p. 102). However, in his deposition he testified that the Bureau was not concerned with mine

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[1] References to the record herein shall be designated as "R" with the following designations: Clerk's record - C.R.; Reporter's Transcript - R.T., date, p.; Depositions - name of the party, DEPO. p.

[2] Hereinafter referred to as MESA.

[3] Hereinafter referred to as Bureau.

safety. This was handled by MESA, and Mr. Webb denied any responsibility for the enforcement of MESA regulations pertaining to abandoned mines. (R. Webb DEPO, pp. 10, 12, 31, 32). The Bureau was not involved in the investigation of plaintiff's accident. (R. Webb DEPO, p. 13). Although it was the function of the Bureau to manage public domain lands, it had no specific system for inspecting the land to see if it is being used properly. (R. Webb DEPO, p. 20). If the Bureau became aware of a dangerous condition of public domain land, it had no system for taking any precautionary action, except perhaps on a developed recreational site. (R. Webb DEPO, pp. 22-23, 35). To Mr. Webb's knowledge the government never established any program to inspect, cover up, bar, close or warn about abandoned or inactive mines on its land, other than the MESA regulations. (R. Webb DEPO, pp. 29-30, 39). He did not regard any Nevada statutes, including those imposing duties to bar up and post abandoned mines, as controlling his behavior in the management of federal lands. (R. Webb DEPO, pp. 33-35). Mr. Webb was aware that people on occasion went into inactive mines, he knew that such mines had vertical shafts in them. (R. Webb DEPO, pp. 37-39). He had read newspaper reports about accidents involving persons exploring mines. (R. Webb DEPO, pp. 38, 40).

Mr. McAlexander, the MESA employee, testified that he knew of incidents in which persons had fallen into mine shafts. (R. McAlexander DEPO, pp. 17-18). He stated that MESA was aware of the existence of many abandoned mines, and he acknowledged that these openings do constitute a hazard, mostly to human

beings. (R. McAlexander DEPO, pp. 12-13). Anybody who has been around the mining industry knows that it is dangerous for people to be around abandoned mine shafts. (R. McAlexander DEPO, pp. 43-44). MESA did nothing to enforce its regulations relating to abandoned mines, because it allegedly did not understand how they were to be enforced. (See R. McAlexander DEPO, pp. 9-10).

It is apparent that Mr. Webb's "unchallenged" denials were meaningless. Since he disavowed any responsibility for safety in the area of the accident, he obviously paid no heed to any activity or hazards there, and there was no reason why anyone should express concern to him or report any accidents to him. The evidence presented to the district court showed that the MESA employees were aware of the existence of the mines in question, the propensity of persons to explore such mines, the dangers involved in any abandoned mine, and the occurrence of prior accidents. Yet MESA remained totally indifferent, passive and quiescent, neglecting to enforce even its own regulations which would have undoubtedly alleviated the latent hazard which brought about the plaintiff's injuries.

2.a. The United States has cited *United States v. Munoz*, 374 U.S. 150, 153 (1963), for the proposition that state law will be applied in a federally controlled area, such as a federal prison. But in *Munoz* this Court held that since the Federal Tort Claims Act provided much-needed relief to those suffering injury from the negligence of government employees, restrictive state rules of immunity would not be allowed to limit suits by federal prisoners. By the same token, a

state law, such as the Nevada sightseer statute, which purports to grant immunity from liability for negligence in maintaining a dangerous condition on land, in order to induce the landowner to open that land to the public, is grossly inapplicable to the United States in its capacity as the owner of open public domain land. To apply such a restrictive statute to the United States would result in encouraging negligence on the part of those government employees who are entrusted with the management of public lands and it would significantly stultify the right of redress which the Federal Tort Claims Act was intended to afford to the public.

2.b. The United States has asserted that Nevada law "demonstrably" requires a showing that willful acts be done with intent to do wrong and cause injury. (Memorandum in Opposition, p. 5). However, the Nevada sightseer statute has never been interpreted by a Nevada state court. The earlier Nevada decisions cited by the lower courts in this case (*Crossman v. Southern Pacific Co.*, 44 Nev. 286, 194 Pac. 839 (1921) and *Rocky Mountain Produce Trucking Co. v. Johnson*, 78 Nev. 4, 369 P. 2d 198 (1962), in which some of the *Crossman* language was criticized, involved questions of active conduct rather than a failure to act.

Many states have adopted sightseer statutes, and the language concerning "willful failure" is virtually identical in these statutes. No state, so far as can be determined, has interpreted this language to mean a deliberate failure to act with a purpose and intent to do wrong and to cause injury. Petitioner has previously cited *Miller v. United States*, 442 F. Supp. 555,

561 (N.D. Ill. E.D. 1976). The decision in that case has been affirmed in *Miller v. Unted States*, 597 F. 2d 614 (7th Cir. 1979). In another recent case involving the Illinois statutes, the district court held, after considering varying Illinois tests for "willfullness" in other contexts, that:

> "The key under any of these 'tests' is (1) the foreseeability of the danger, its probability and gravity of harm; (2) the knowledge of the defendant of the danger; (3) the actions which the defendant took in view of the first two factors. I am convinced that no spirit of ill will or intentional misconduct is essential to prove willfulness. Rather it is conduct which takes on the aspect of highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. If such conduct is found, the plaintiff is entitled to recovery event though certain defenses would have prevented his recovery for ordinary negligence."
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> *Stephens v. United States*, 472 F. Supp. 998, 1016 (C.D. Ill. 1979).

If the Nevada statute, properly interpreted, requires that an intent to do wrong and to inflict injury must be superimposed upon the statutory requirement of willful failure to guard or warn against danger, it is apparent that the issue of intention involves the subjective state of mind of the agents or employees of the United States. It is peculiarly inappropriate to decide such an issue upon the basis of the documents submitted in a summary judgment proceeding. As stated in *Croley v. Matson Navigation Company*, 434 F. 2d 73, 77 (5th Cir. 1970):

> "The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of

state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind."

The United States has supported the holding of the lower courts that any violation of the Nevada fencing statute (Nev. Rev. Stat. Secion 455.010; Pet. App. D 5) would only constitute evidence of negligence or at most negligence per se. The Court of Appeal held that such a violation could not constitute willfulness in the light of the district court's conclusion that there was no evidence of willfulness. (Pet. App. B 8). Petitioner submits that (1) the district court's finding was based upon an erroneous interpretation of the Nevada sightseer statute and (2) there is no logical reason why a deliberate and intentional violation of the Nevada fencing statute should be subject to the same interpretative evaluation.

Moreover, to the extent that the United States' violation of the Nevada fencing statute involved a consideration of the state of mind of the government's agents and employees, the permissible inferences which could be drawn from the United States' deliberate refusal to comply with that statute, notwithstanding its knowledge of the danger involved in unguarded abandoned mines, gave rise to a triable issue of fact.

2.c. The United States has not answered petitioner's challenge to the constitutionality of the Nevada sightseer statute. It has cited *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) for the proposition that issues presented for the first time on appeal need not be considered. (Memorandum in Opposition, pp. 5-6). But in *Hormel* this Court upheld the appellate consideration of a new issue by the Court of Appeals. It was pointed

out that ordinarily issues not raised below will not be considered by an appellate court if these issues involved the presentation of evidence to support or defeat them. But this Court also noted that since the rules of practice and procedure are devised to promote the ends of justice, not to defeat them, it would be out of harmony with this policy to adopt a rigid and undeviating judicial practice to decline consideration of all questions not previously and specifically urged. This Court stated that:

"Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Hormel v. Helvering, supra, 312 U.S. 552, 557.

Petitioner submits that, just as in *Hormel*, to apply the general procedural rule in the case at hand would defeat rather than promote the ends of justice.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. NILAND,

MICHAEL G. BRISKI
Of Counsel.

Attorney for Petitioner.

I. EDWARD J. NILAND, a member of the Bar of the Supreme Court of the United States and counsel of record for DOUGLAS S. GARD, petitioner herein, hereby certify that on September 25, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Reply to Memorandum in Opposition by depositing such copies in the United States Post Office, 105 North First Street, San Jose, California 95113, with first-class postage pre-paid, properly addressed to the post office address of Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

DATED: September 25, 1979.

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